Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 79-1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRED LOWENSCHUSS,

Petitioner,

vs.

C.G. BLUHDORN, GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO., INCORPORATED,

and

RACHEL C. CARPENTER and THE McINTOSH FOUNDATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS C.G. BLUHDORN AND GULF & WESTERN INDUSTRIES, INC. IN OPPOSITION

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This Petition arises out of the affirmance by the United States Court of Appeals for the Second Circuit of an order approving as fair and reasonable a Stipulation of Settlement in this seven and one-half year old consolidated class action.

The Stipulation of Settlement was executed by counsel for defendants and by every attorney (other than Petitioner Fred Lowenschuss) who has ever represented the class. Lowenschuss, who is also the only class member who has objected to this settlement, was originally the self-appointed class representative and class counsel in each of the three actions which are the subject of the Stipulation. However, during the pendency of these actions he was removed or

compelled to resign from the positions of trust to which he nominated himself.

In affirming the approval of the Settlement on the grounds, *inter alia,* that it "would enable class members to recover as much as they could reasonably have expected after trial" (17a), the Second Circuit had occasion to observe that, throughout the litigation, Lowenschuss had engaged in "a pattern of highly improper conduct . . . in making baseless and unjustified personal and professional attacks upon numerous reputable persons involved in the case, including counsel for various parties and district judges." (20a)*

After a "careful review of the record and briefs" (17a), the Second Circuit concluded that Lowenschuss' appeal was frivolous and it assessed double costs under Rule 38 of the Federal Rules of Appellate Procedure (20a) in the sum of $6,566.26 (Petition at 18). The court also requested the Pennsylvania Bar Association to review Lowenschuss' conduct and "to take such action as is appropriate." 20a.

By his Petition, Lowenschuss attacks the Second Circuit's finding that his appeal was frivolous and challenges the power of that court to assess double costs and to invite an inquiry by the Pennsylvania Bar Association. Lowenschuss' principal grievance is that the assessment of double costs and the reference to the bar association were made without his having had the opportunity to be heard on those issues. It is true that no application was made by Lowenschuss' adversaries for the relief that the Second Circuit considered appropriate. The *sua sponte* character of that relief does not, however, furnish a ground for further review; it merely underscores the extraordinary character of the record on which the Second Circuit felt compelled to act.

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* Following the Second Circuit's *per curiam* opinion, Lowenschuss' petition for rehearing en banc was denied. 21a-22a.

It is distasteful to review the particulars of the conduct which prompted the Second Circuit to take the action it took; there can be no doubt, however, as to the necessary and appropriate character of an appellate court's power to effectively discipline or discourage litigants from frivolous appeals and other abuses of the judicial process. A review of the facts shows that this was an appropriate case for the exercise of such discretion.

Violation of professional standards is a proper concern of the courts. While Lowenschuss' Petition suggests that the Second Circuit has evidenced a recent and unique disposition to arrogate such power to itself, the power to assess double costs has been established by statute (28 U.S.C. § 1912), has been implemented by rule (Rule 38, F.R.A.P.) and has been exercised where appropriate by the several Courts of Appeals. *See, e.g., In the Matter of Newport Harbor Associates,* 589 F.2d 20, 24 (1st Cir. 1978); *United States* v. *Santa Fe Engineers, Inc.,* 567 F.2d 860, 861 (9th Cir. 1978); *Clarion Corp.* v. *American Home Products Corp.,* 494 F.2d 860, 865-66 (7th Cir. 1974); *Fluoro Electric Corp.* v. *Branford Associates,* 489 F.2d 320, 326 (2d Cir. 1973), *cert. denied,* 419 U.S. 870 (1974); *NLRB* v. *Bedford Discounters, Inc.,* 484 F.2d 923 (1st Cir. 1973); *Occidental Life Insurance Co.* v. *Eiler,* 126 F.2d 429 (8th Cir.), *cert. denied,* 316 U.S. 688 (1942). *See also Amory* v. *Amory,* 1 Ott. 356, 357 (1875).

Finally, with respect to the Second Circuit's reference of these matters to the Pennsylvania Bar Association, it does not require citation to establish that Courts of Appeals, in the exercise of their supervisory responsibilities, have the obligation as well as the power to invoke the disciplinary rules which govern the conduct of all members of the Bar and to refer violations to the proper disciplinary authorities.

CONCLUSION

The Petition should be denied. The exercise of discretion by the court below was fully justified and the decision was correct. The decision rests upon the particular and, fortunately, unusual facts of this case.

Dated: New York, New York
July 17, 1980

Respectfully submitted,

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